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Supreme Court Of The United States

October Term 1969

No. 629

CLARENCE WHITE, JR.,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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THE STATE OF SOUTH CAROLINA,
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PETITION FOR WRIT OF CERTIORARI

Petitioner, Clarence White, Jr., by his counsel, prays that a writ of certiorari to review the judgment of the Supreme Court of the State of South Carolina, affirming the verdict of the jury of the Court of General Sessions, Third Judicial Circuit, Sumter County, South Carolina, finding petitioner guilty of the charge of involuntary manslaughter under an unamended indictment for murder of one Thomas Wright.

OPINIONS BELOW

No opinion filed by the presiding judge of the Court of General Sessions, Third Judicial Circuit; rulings and decisions made by him during the trial of petitioner and at its conclusion are incorporated in the *transcript of record*, hereinafter referred to as (T.). Judgment, or opinion, of the Supreme Court of South Carolina, filed July 1, 1969, affirming conviction of petitioner (pages 1a to 8a, this petition) is not yet reported. Order of an associate justice of the court granting a stay of remittitur to file this petition (page 9a, this petition).

JURISDICTION

Construction of the Fifth Amendment and of the Sixth and Fourteenth Amendments to the Constitution of the United States, and applicable provisions of the state constitution and state statutes.

CONTENTIONS PRESENTED

Fifth Amendment

1. Denying petitioner the right to call his home during in-custody interrogation was violation of the rights of petitioner, being equivalent to denying him the right to counsel. Page 14.

2. Proper warning was not given to petitioner prior to his in-custody interrogation. Page 17.

3. Refusal to charge the jury that it must first find that petitioner voluntarily, knowingly and intelligently waived his rights was in breach of petitioner's constitutional right. Page 18.

Sixth and Fourteenth Amendments

1. Repetitious reference to the existence of the "Voluntary Statement" constituted denial of due process to petitioner. Page 20.

2. Attempted verbal amendment of the indictment and allowing the unamended indictment for murder to go to the jury was a denial of due process. Page 22.

3. Refusal to charge the jury that it must first find that petitioner voluntarily, knowingly and intelligently waived his rights was denial of due process. Page 25.

4. Denial of motion by petitioner for judgment notwithstanding the verdict or, in lieu thereof, for new trial was erroneous and affirmance thereof by the state supreme court constituted denial of due process of law. Page 25.

STATEMENT OF GROUNDS

The jurisdiction of the Court is invoked on the grounds that petitioner was denied the protection to be afforded to him under the Fifth Amendment and under the Sixth and Fourteenth Amendments to the Constitution of the United States by the rulings of the presiding judge, third judicial circuit, South Carolina, during the trial of petitioner, and that the opinion, or judgment, of the Supreme Court of South Carolina, filed July 1, 1969, affirming said rulings and the conviction of petitioner of the charge of involuntary manslaughter on an unamended indictment for murder departed from applicable principles contained in the decision of the Court in *Miranda v. Arizona,* 384 U.S. 436; 86 S.Ct. 1602, and with the construction of the Sixth and Fourteenth Amendments to the Constitution of the United States.

The jurisdiction of the Court is also invoked on the ground that the Supreme Court of South Carolina, in the instant case, has decided an important state question in a way in conflict with Section 17, Article 1, of the South Carolina State Constitution, and in conflict with section 17-410 of the South Carolina Code of Laws, 1962.

CONSTITUTIONAL AND STATE STATUTORY PROVISIONS INVOLVED

Constitution of the United States,

Amendments:

"*Art. V.*—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces ,or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"*Art. VI.*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

"*Art. XIV, section 1.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of South Carolina,
Article 1, Section 17 (Vol. 16, S.C. Code of Laws, 1962, page 33):

"No person shall be held to answer for any crime where the punishment exceeds a fine of one hundred dollars or imprisonment for thirty days, with or without hard labor, unless on a presentment or indictment of a grand jury of the County where the crime shall have been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall be compelled in any criminal case to be a witness against himself. Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."

South Carolina Code of Laws, 1962:

"Section 16-51.—"Murder" is the killing of any person with malice aforethought, either express or implied.

"Section 16-55.—Manslaughter, or the unlawful killing of another without malice, express or implied, shall be punishable by hard labor in the Penitentiary not exceeding thirty years nor less than two years; *provided*, that when the jury returns a verdict of guilty of involuntary manslaughter, the punishment shall be not less than three months nor more than three years in the discretion of the judge."

"Section 17-409. *How defects in indictments may be objected to.*—Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."

"Section 17-410. *Amendments of indictments.* — If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) *if such amendment does not change the nature of the offense charged.* After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended, unless such amendment shall operate as a surprise to the defendant, in which case the defendant shall be entitled, upon demand, to a continuance of the cause (italics supplied)."

STATEMENT OF THE CASE

Part I

At the trial of petitioner it was stipulated that Thomas Wright had come to his death as result of being shot by a pistol. Only one bullet had been fired from the pistol.

Part II

When petitioner was tried February 15, 1968, he was 22 years of age; married, and had two children by his wife.

He was working at a plywood mill; his wife also worked.

Petitioner had known Thomas Wright since petitioner was about six years old; they were friends through the years, like brothers. Thomas Wright was married, having one child, and petitioner and Thomas Wright's wives were friends, visiting and exchanging articles of clothing for the children. Petitioner and Thomas Wright loaned each other money, swapped clothing back and forth. The pistol, owned by petitioner, was also swapped between them. Sometimes Thomas Wright had the pistol two or three days; he had returned the pistol to petitioner about three or four days before the accident. They had played and tussled with each other before they were married, and this continued after marriage.

Part III

Saturday night, January 7, 1967, petitioner had "cut through the block", i.e., walking through his backyard and through the backyards of others and coming out between two houses on West Bartlette Street. He had his pistol with him on his way to see his cousin because he was afraid of the dogs on Charles Street, which would "run at you". He had crossed West Bartlette Street and was starting to walk down Charles Street when he was called by Thomas Wright, who said or questioned him' " . . . you don't have nothing (?) . . . " (T.47, ff.185-186).

Petitioner walked back towards Thomas Wright who was walking towards petitioner. Petitioner did not knew whether Thomas Wright was talking about money or the pistol. Petitioner did not have any money. He pulled the pistol out from his hip pocket. If Thomas Wright had wanted the pistol he could have had it and petitioner would

have gone back home. Thomas Wright could not help but see the pistol because of the street light. Petitioner had the pistol in his hand; it was not pointed at Thomas Wright because he "had the pistol over here (indicating) (T.48, (f.192; T.49, f.193)." Petitioner's finger was on the trigger of the pistol but he did not know whether the pistol was cocked. It would go off quicker if it were cocked. According to petitioner, when he and Thomas Wright met, unexpectedly to petitioner, Thomas Wright hit or knocked appellant's hand, with the pistol in it, and the pistol went off. After the pistol went off, petitioner went to Thomas Wright and, seeing blood on Thomas Wright, he ran into the house of a neighbor and asked the residents to call an ambulance. Then he went back out to Thomas Wright, but because relatives of Thomas Wright began fighting him, petitioner went back to his home with his wife and aunt, taking the pistol with him but, before reaching his house, throwing the pistol away. Later he helped the police officer to look for the pistol, which was found in some bushes or weeds.

Part IV

Petitioner was taken into custody at his home and removed, by car, to the city police headquarters. Once there, petitioner followed a city detective, as he had been instructed to do, to the detective's office. He and the city detective were alone in the office and although everything he told the city detective was free and voluntary, he was "shook up" and he was afraid of the detective at the time he was being questioned.

Part V

Petitioner, in the absence of the jury, testified that he

was refused the right to call his home or the hospital, where Thomas Wright had been admitted as a patient, until after he had signed the "Voluntary Statement"; further, that he had not read the statement and the statement was being read to him by the city detective while he, petitioner, was on the telephone talking with his wife. Petitioner has but about a sixth-grade education and, also in the absence of the jury, testified that he did not know the meaning, among others, of the words, *tend, incriminate, waive, aforesaid, coercion, leniency* and *certify.* These words are used in the preface to the "Voluntary Statement". No testimony was offered by petitioner in the presence of the jury that he had been denied the right to call his home or the hospital until after the statement was signed, and no testimony was offered in the presence of the jury concerning his ignorance of the meaning of the above italicized words; but, in this connection, no testimony was offered by the state contradicting or rebutting, in any sense, the testimony of petitioner in the absence of the jury that he had been denied the right to call his home or the hospital and of his ignorance of the meaning of the italicized words.

Also, in the absence of the jury, petitioner testified, in substance, that he had not been given the warnings required under *Miranda v. Arizona,* 384 U.S. 436; 86 S.Ct. 1602, and that he had not been informed that he was charged, or would probably be charged, with the commission of any crime.

Part VI

The statement which the city detective secured from petitioner is entitled "Voluntary Statement"; it is prefaced by a printed warning in fine print (defendant's exhibit 7, or reduced size copy, T.75). Although the trial judge rul-

ed that this "Voluntary Statement" was inadmissible because of the word "voluntary" and that criticism of the fine print was well taken; he held that a proper showing had been made for admission of the statements contained in the "Voluntary Statement" and allowed the city detective to testify as t othe contents of the statement.

Part VII

Petitioner was brought to trial under an indictment for murder (cf., stipulated xerox copy of original indictment or T.6 for partial copy). At the close of the state's case, the trial judge ruled that petitioner could only be charged with voluntary or involuntary manslaughter (T.40, f.160); however, after the trial judge began his charge to the jury, he had concluded and stated to the jury that petitioner could only be charged with involuntary manslaughter (T.67, ff.267-268). Thus the unamended indictment, containing the elements of the charge of murder against petitioner, was in the hands of the jury for consideration, physically unchanged except that someone had stricken through the word "murder" on the caption of the indictment and, in place thereof, printed the word "manslaughter".

The Stage in the Proceedings When Federal Questions were Raised

FIFTH AMENDMENT

When the trial judge ruled that the proper foundation had been laid for oral recitation as to the contents of the "Voluntary Statement" (T.35, ff.137-140).

In the following-quoted exceptions on appeal from the circuit court to the Supreme Court of South Carolina T.76-77):

"2. His honor erred in allowing the officer, a witness for the State, to testify as to the statements allegedly made to the officer by defendant when he had ruled prior thereto that the alleged statement itself could not be introduced in evidence.

"3. His honor erred in allowing the officer, a witness for the State, to testify as to alleged statements made by defendant to him when the testimony of defendant, in the absence of the jury, clearly indicated that the statements attributed to defendant, in the circumstances existing at the time when made, constituted an infringement of the rights of defendant.

"4. His honor erred in allowing the officer, a witness for the State, to testify as to the alleged statements when the testimony established that the statements allegedly secured from defendant were secured during incustody questioning and that there had been no voluntary appearance by defendant at the police station for the purpose of making any such alleged statements.

"5. His honor erred in denying the motion by defendant for judgment notwithstanding the verdict when he stated that his reason for doing so was because defendant had put up no evidence that in any way showed an infringement upon his rights.

"8. Defendant contends that he has been denied the protection afforded to him under the Fifth Amendment to the Constitution of the United States by the rulings

and orders and charge of the circuit judge during the course of the trial of defendant and in refusing the motion by defendant for judgment notwithstanding the verdict of the jury."

The above-quoted exceptions were presented to the Supreme Court of South Carolina in the brief of petitioner under "Questions Involved", pages III and IV, as follows:

"2. After ruling that the statement itself could not be introduced in evidence, was it error to allow the officer to testify as to the contents of the statement?

"3. Were the contents of the statement admissible when the only reasonable inference to be derived from the testimony given in the absence of the jury is that the rights of appellant were infringed in securing the statement?

"4. Were the statements attributed to appellant admissible when they resulted from in-custody interrogation?

"5. Should the motion for judgment notwitstanding the verdict have been denied on the ground appellant did not offer testimony *before the jury* that his rights were infringed by the in-custody interrogation?

"8. Was appellant denied the protection afforded him under the Fifth Amendment to the Constitution of the United States?"

SIXTH AND FOURTEENTH AMENDMENTS

The rights of petitioner under the Sixth and Four-

teenth Amendments are raised specifically for the first time by this petition; it is submitted, however, that the questions raised during the course of the trial and by the following-quoted exceptions at the conclusion of the trial are embraced within the purport and intent of the Sixth and Fourteenth Amendments (T.76-77); further, petitioner had no prescience that the state supreme court would not heed provisions of these Amendments:

"1. His honor erred in allowing the indictment for murder (without incorporation of written amendment thereto) to go to the jury when he had ruled that defendant was being tried for involuntary manslaughter.

"5. His honor erred in denying the motion by defendant for judgment notwithstanding the verdict when he stated that his reason for doing so was because defendant had put up no evidence that in any way showed an infringement upon his rights."

The above-quoted exceptions were presented to the Supreme Court of South Carolina in the brief of petitioner under "Questions Involved", page III, as follows:

"I. After eventually deciding appellant could only be charged with involuntary manslaughter, was it error to allow the unamended indictment for murder to go to the jury?

"5. Should the motion for judgment notwithstanding the verdict have been denied on the ground appellant did not offer testimony *before the jury* that his rights were infringed by the in-custody interrogation?"

CONTENTIONS FOR GRANTING THE WRIT UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION

1. Denying petitioner the right to call his home during in-custody interrogation was in violation of his rights, being equivalent to denying him the right to counsel.

In the absence of the jury, in giving testimony for the trial judge to consider in determining the admissibility of the "Voluntary Statement" and/or the statements attributed to petitioner therein, petitioner testified that he had followed the city detective to his office, not knowing whether Thomas Wright was seriously hurt (T.27, ff.105-106); that he and the detective were alone in the detective's office (T.33, f.132; T.34, f.133); that while he did not think he had to tell the detective anything, he was "shook up" and he was afraid of the detective at the time he was being questioned (T.28, ff.109-110), but everything he told the detective was free and voluntary (T.34, ff.134-135), but he was uninformed of any criminal charge having been made against him (T.29, f.113). Petitioner also testified that the detective did not tell him he did not have to answer any questions (T.28, ff.109-110); did not tell him that any statement he made could be used against him in a court-room (T.28, ff.111-112); did not tell him that he could stop the questioning at any time he desired (T.29, ff.115-116); did not tell him if he wanted a lawyer he could get a free lawyer for him, and did not tell the detective he did not want a lawyer (T.29, ff.113-115).

Also in the absence of the jury the city detective testified that he and petitioner were alone in his office when

the in-custody interrogation was taking place (T.23, ff.90-91), and neither the detective, Mr. Lyles, nor any witness on behalf of the state, contradict the following testimony given by petitioner in the absence of the jury (T.32, ff.125-127):

"Q. . . . . did you ask to call anybody while you were talking to Mr. Lyles?

A. Yes, sir.

Q. Who did you ask to call?

A. I asked to call the hospital and my house.

Q. Did he refuse to let you call the hospital?

A. At the time he did.

Q. Did he refuse to let you call your home?

A. At the time he did.

Q. Did he let you call after he got through with you?

A. After I sign that (the statement) he told me I could use the phone

Q. After you signed it?

A. No, sir.

Q. Now was this statement read to you, did he read it back to you?

A. I was talking on the telephone when he read it, was talking to my wife.

Q. You had already signed the statement?

A. Yes, sir."

Although the brief of petitioner directed the attention of the Supreme Court of South Carolina to the foregoing uncontradicted testimony by petitioner (cf., page 31, brief of appellant in the state supreme court), the opinion of the Supreme Court of South Carolina contains no reference whatsoever to this uncontradicted testimony or whether denial of permission to petitioner to telephone his home during in-custody interrogation constituted a violation of the rights of petitioner under *Miranda v. Arizona*, 384 U.S. 436; 86 S.Ct. 1602, 1614(10):

> "Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented.
>
> " . . . . The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy — being alone with the person under interrogation. The efficacy of this tactic has been explained as follows:
>
> " 'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. *The subject should be deprived of every psychological advantage. In his own home* he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover *his family and other friends are nearby*, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.' "

And,continuing (1619(11):

"It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. . . . . *Unless adequate protective devices are employed* to dispel the compulsion inherent in custodial surroundings, *no statement obtained from the defendant can truly be the product of his free choice* (italics supplied)."

It is submitted that the reason the city detective would not grant permission to petitioner to telephone his home, or the hospital, was because the detective feared an intrusion on his privacy and power over petitioner by members of the family or friends of petitioner or of an attorney whom they might retain. It is further submitted that this refusal was a denial to petitioner of his rights under *Miranda v. Arizona, supra,* and was, in fact, tantamount to denying petitioner the right to counsel.

2. Proper warning was not given to petitioner prior to in-custody interrogation.

It is submitted that the fine-print acknowledgement in the preface to the "Voluntary Statement", including any other fine-print warnings contained in the preface to the alleged statement, not having been received in evidence, cannot be used to supplement the testimony of the city detective. If this is correct, then petitioner was not properly warned of his rights by the city detective (he being the only officer alleged to have given warnings to petitioner). Thus, *in the absence of the jury,* the detective testified (T.21, f.84; T.22, f.85):

"A. I advised him that . . . . If he could not afford a lawyer one would be provided for him, and he was entitled to have a lawyer present during the time that he was questioned."

And, *in the presence of the jury, the detective* testified (T.37, f.145):

> "A. I advised him he .... was entitled to have a lawyer present, during the time of questioning, and if he could not afford one, one would be provided for him."

At no point in the testimony of this officer, or in the testimony of any other witness, is there any statement *that petitioner was informed he had the right to see a lawyer before he was questioned or that,* if he could not afford one, *a lawyer would be appointed for him prior to any questioning,* if he so desired, as required by *Miranda v. Arizona,* 384 U.S. 436; 86 S.Ct. 1602, 1630 (66,67).

IN ADDENDUM, from the above and from the transcript of record, the state supreme court states, *without any foundation in fact* (p.4a, this petition):

> " .... This officer testified that ... appellant ... waived ... his privilege of having an attorney present *prior to any questioning.* .... (italics supplied)."

3. Refusal to charge the jury that it must first find that petitioner voluntarily, knowingly and intelligently waived his rights was a denial of petitioner's constitutional rights.

The trial judge charged the jury (T.70, ff.279-280; T-71, ff.281-282):

> "An alleged statement, or an alleged confession, is not to be accepted by the jury as creditable or believed, unless certain elements have been shown by the State before the alleged statement was made. The State of South Carolina has to show beyond a reasonable doubt that the statement, if made, was made freely and voluntarily, without any promise of reward or hope of leniency; that it was not brought about by fear or any threats.

> The State further has to show that before the alleged statement was made that the defendant was apprised or advised of his Constitutional rights, to wit, the right to remain silent; that the statement has to be voluntary; that if made it could be used for him or against him. He must be further advised that he has the right to counsel, the right to a lawyer; that if he desires one and could not afford to have one, that he would be supplied with a lawyer. And that he had a right to have a lawyer present prior to and at the time of making an alleged statement. And a statement made by a defendant cannot be considered by the jury, should not be considered by the jury, unless it be shown that the defendant fully understood that which he is alleged to have said; fully understood the contents of the alleged statement."

At the conclusion of the charge to the jury, attorney for petitioner called attention of the trial judge to the fact that the charge did not include instruction, in substance, that before the statements attributed to petitioner could be considered the jury would first have to find that petitioner had knowingly and intelligently waived his constitutional rights (T.71, f.284), to which the trial judge replied that he had used the word "understood" (T.72, f.285). But *the word "understood" as used in the charge has* application only to "the contents of the alleged statement" and *no application whatsoever as to whether petitioner had* voluntarily, knowingly and intelligently *waived his constitutional rights. Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602,1612 (3-9):

> " . . . . The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. . . . . "

It is submitted that the denial by the trial judge to charge

as requested by counsel for petitioner was in violation of his rights as established by *Miranda v. Arizona, supra.*

CONTENTIONS FOR GRANTING THE WRIT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

1. Repetitious reference to the existence of the "Voluntary Statement" constituted denial of due process to petitioner.

The city detective had the "Voluntary Statement" in his hands when he first took the witness stand in the presence of the jury and when counsel for petitioner asked that the jury be excused. Thereupon, the trial judge informed the jury that he had to hear testimony to determine whether *it* was admissible (T.21, f.81). After the jury had been excused, when the city detective was asked by counsel for petitioner whether the "Voluntary Statement", with its fine print, was not a ruse and *to tie in a* defendant, he answered (T.25, ff.99-100):

> "I don't know that. The only information that I, I repeat, it contains the information as far as the Miranda decision is concerned, which I explained to him fully and that is just a part of the form, *which goes to the, to it again, whenever* he reads it before he signs it (italics supplied)."

When the two words "tie" and "in" are inserted in the above-quoted answer, it is clear that the city detective tried hard not to say that the "Voluntary Statement" was meant to tie him (petitioner) in, whenever he read the statement. Shortly after this, in the absence of the jury, petitioner

offered the "Voluntary Statement" as an exhibit, not as evidence (T.26, ff.101-102) and, later, in the absence of the jury, the trial judge ruled the statement could not be admitted in evidence because it was labeled 'voluntary' and that criticism by counsel for petitioner as to the fine print was well taken (T.35, ff. 137-138) and ordered same taken from hands of the detective (T.36, f.141). *Miranda v. Arizona*, 384 U.S. 436; 86 S.Ct. 1602, 1637(74-75):

> " . . . . The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional right. . . . . "

In spite of the fact that the "Voluntary Statement" was not admitted in evidence, the record shows that, over objection, and thus refreshing the mind of the jury, the state referred to its existence (T.36, ff.141-143); the trial judge in his charge to the jury referred to its existence, throughout his charge, concluding his charge with the instruction that petitioner must have "fully understood the contents of the statement" (T.70, ff.279-280; T.71, ff,281-282), and the Supreme Court of South Carolina itself refers to the "statement" rather than to admissions alleged to have been made by petitioner to the detective (p. 5a, this petition).

On the basis of the record, petitioner would have been in better position with the jury had the jury seen for itself the statement, labeled "Voluntary Statement", containing its fine-print warnings, and to which petitioner, a semi-literate (T.27, ff.106; T.28-30), had affixed his signature at the conclusion of in-custody interrogation, rather than to endure during the course of the trial repetitious reference to the existence of a physical document which the jury,

from the record, had cause to believe was kept from their discernment by counsel for petitioner. It is therefore submitted, on the basis of the record, that petitioner was by the acts of the state during interrogation of the city detective and by the charge of the trial judge to the jury denied his right to due process of law under the Sixth and Fourteenth Amendments of the Constitution.

2. Attempted verbal amendment of the indictment and allowing the unamended indictment to go to the jury was denial of due process.

Petitioner was indicted for murder, said indictment containing no separate counts as to voluntary and involuntary manslaughter (cf., page 5, this petition for sections 16-51 and 16-55, South Carolina code of laws). At the close of the state's case the trial judge concluded there was no evidence to support the charge of murder and held that the charge against petitioner would have to remain as to voluntary or involuntary manslaughter (T.40, ff.158-160). At the close of the case, the trial judge then proceeded to charge the jury (T.67-71), and it became apparent shortly after the opening of his charge that he had concluded, *sua sponte,* that the only charge on which appellant was to be tried would be that of involuntary manslaughter (T.67, ff.267-268).

Section 17, article 1, of the Constitution of the State of South Carolina states that no person shall be held to answer for any crime unless on a presentment or indictment of a grand jury (cf., page 5, this petition for this section of the state constitution). The unamended indictment of petitioner containing elements of the charge of murder was in the hands of the jury for their inspection, the word "murder" in the caption having been stricken through and,

in lieu thereof, the word "manslaughter" having been printed in ink therein by some person unknown (cf., xerox copy of original indictment, or partial copy at T.6). Section 230(a), 42 C.J.S. 1239:

> "In matters of substance. At common law, or in the absence of statute, an indictment, being the finding of a grand jury on oath and depending on this fact, among others, for its validity, cannot be amended by the Court or the prosecuting officer in any matter of substance without the concurrence of the grand jury which presented it; . . . . . A fortiori, *there can be no such amendment where the constitution requires an indictment by a grand jury* (italics supplied)."

The attempted amendment of the indictment violated rights of petitioner under section 17, article 1, of the Constitution of South Carolina, and under the Sixth and Fourteenth Amendments to the United States Constitution, as petitioner was not apprised that he was to be tried for any charge except that of murder, with privilege to the jury to convict him of murder, or of an offense less than murder, or to acquit him. Section 587, 16A C.J.S. 640:

> "An intelligent and full understanding by the accused of the charge against him being a first requirement of due process, an indictment or information, to afford due process of law, must fairly inform the accused of the specific charge against him, and contain a statement of the acts which constitute the offense with reasonable certainty, so as to advise accused what he has to meet and give him a fair and reasonable opportunity to prepare his defense; . . . . "

The attempted amendment in the instant case changed

the nature of the offense charged against petitioner in the indictment (cf., sections 17-409 and 17-410, South Carolina Code of Laws, 1962, page 6, this petition). As was stated in State v. Sowell, 85 S.C. 278; 67 S.E. 316, 318:

> " . . . . The indictment alleged the offense to have been committed in the daytime. The proof was that it was committed in the nighttime. . . . . In State v. Bouknight, 55 S.C. 353; 33 S.E. 451; 74 Am.St.Rep.751, it was held that section 145, supra, 'creates two distinct and different offenses, though both belong to the same class of felonies, and are punishable in the same way,' and that, where both offenses are charged in separate counts in the same indictment, the solicitor may be required to elect upon which he will go to trial. The time of its commission is therefore of the essence of the offense. . . . . The two offenses being distinct and different, *the amendment not only changed the nature of the offense charged, but substituted an entirely different one for the one charged, and was therefore a violation of the rights* of the accused, guaranteed by section 17, art. 1, of the Constitution, which says: 'No person shall be held to answer for any crime . . . . unless on a presentment or indictment of a grand jury', etc. The grand jury had not presented or indicted the defendants for the offense for which they were tried and convicted (italics supplied)."

It appears only just that if the state desired to prosecute petitioner for an offense less than murder, then separate counts, e.g., voluntary and involuntary manslaughter should have been contained in the proposed indictment for consideration by the grand jury; and, upon election by the solicitor, the count or counts deemed by him as inapplicable to prosecution of petitioner could have been stricken

from the indictment and the count or counts on which the solicitor sought conviction of petitioner placed in the hands of the petit jury for its consideration at the conclusion of the charge by the trial judge. Instead, the unamended indictment itself was physically in the hands of the jury containing the charge of murder, and the jury could not but be influenced by the fact that the trial judge (who was more versed and learned than they) had reached the decision that appellant was guilty of involuntary manslaughter and returned their verdict accordingly.

3. Refusal to charge the jury that it must first find that petitioner had voluntarily, knowingly and intelligently waived his rights was denial of due process.

Refusal by the trial judge to charge the jury that before they could consider the testimony of the city detective concerning statements alleged to have been made to him by petitioner they must first find that petitioner voluntarily, knowingly and intelligently waived his rights under the Constitution was a denial of due process to petitioner. Confer, contention 3 under the Fifth Amendment, page 18, this petition.

4. Denial of motion by petitioner for judgment notwithstanding the verdict or, in lieu thereof, for new trial was erroneous and affirmance thereof by the state supreme court constitutes denial of due process of law.

The trial judge erred in refusing to grant the motion of petitioner for judgment notwithstanding the verdict or, in lieu thereof, a new trial as, from the charge made by the trial judge, the trial judge was of the opinion that petitioner (p. 19, this petition; T.71, ff281-282):

" . . . . had a right to have a lawyer present prior to and at the time of making an alleged statement. . . . ."

From the testimony before him concerning the admissibility of the "Voluntary Statement", the judge knew that the state had not established that petitioner had been warned that he had the "right to have a lawyer present prior to and at the time" when the alleged statement was secured from petitioner.

The refusal of this motion by the trial judge on the ground that petitioner had not offered testimony before the jury showing an infringement of his rights (T.73, f.292; T.74, f.293) was immaterial and irrelevant because the state, by the trial judge's own understanding and instruction to the jury, had failed to lay the proper foundation for admission of the testimony of the officer concerning statements secured by him from petitioner during in-custody interrogation.

The affirmance by the state supreme court of the denial by the trial judge of this motion by petitioner (p. 6a, this petition) is based on the erroneous premise that petitioner had been properly warned of his rights; that the testimony was to be considered in the light most favorable to the state, and on irrelevant testimony by "witnesses" *indicating* that the deceased did not strike the hand of petitioner. For, relevant testimony of these witnesses, confer, T.11, f.41 and T.14, f.53.

IN ADDENDUM: The state supreme court assays this conumdrum (p. 5a, this petition):

" . . . . *The trial judge heard* the confession evidence *and resolved* the conflicts therein *and admitted* the oral statement in evidence, *such being a determina-*

tion of the voluntariness thereof. . . . (italics supplied)."

Such being "a determination", i.e., a finding of fact, why should the state supreme court cavil that petitioner did not offer testimony before the jury (p. 5a, this petition)? Exactly. Why the jury?

It is therefore submitted that the opinion of the state supreme court affirming this ruling by the trial judge constitutes denial of due process of law to petitioner under the Sixth and Fourteenth Amendments to the Constitution.

CONCLUSION

The questions raised in this petition are of great importance to approximately 2,380,000 residents of the State of South Carolina, subject to judgment of the Supreme Court of South Carolina as the state court of last resort.

Respectfully submitted,

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and

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Counsel for Petitioner.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

The State, ... *Respondent,*

v.

Clarence White, Jr. . . . . *Appellant.*

Appeal From Sumter County
G. Badger Baker, Judge

Opinion No. 18935
Filed July 1, 1969

AFFIRMED

W. L. Clifton, of Sumter, for appellant.
Solicitor R. Kirk McLeod, of Sumter; Attorney General Daniel R. McLeod and Assistant Attorney General C. Pinckney Roberts, both of Columbia, for respondent.

MOSS, C. J.: The appellant, Clarence White, Jr., was tried in the Court of General Sessions for Sumter County, under an indictment charging him with the murder of

Thomas Wright, on January 7, 1967. The appellant was found guilty of involuntary manslaughter and was sentenced to imprisonment for eighteen months.

The appellant was initially charged with murder but at the close of all of the testimony, the trial judge submitted to the jury only the question of whether the appellant was guilty or not guilty of involuntary manslaughter. We quote the following from the charge:

> "* * * the defendant in this case is indicted for murder. And printed on the front of the indictment, and contained in the indictment, you will also find the use of the word murder. Although not expressly contained therein, or printed or written in the indictment, is the lesser offense known as involuntary manslaughter. And that is the charge upon which this defendant is on trial. It is contained within the indictment upon the principal that the greater includes the lesser. Now in reading the indictment, you are not going to find the phrase involuntary manslaughter, but it is there, and it is the charge before you, whether or not the defendant is guilty or not guilty of involuntary manslaughter."

The general rule is that an indictment for a higher offense will sustain a conviction for a lower offense included in the higher. State v. Self, 225 S. C. 267, 82 S. E. (2d) 63. Under an indictment for murder in the usual form, a conviction may be had for involuntary manslaughter. State v. Causer, 87 S. C. 516, 70 S. E. 161. It was also held in the last cited case that the negligent handling of a loaded gun causing death will support a verdict for involuntary manslaughter. The foregoing rules were restated and approved in State v. Phillips, 226 S. C. 297, 84 S. E. (2d) 855.

The appellant charges error on the part of the trial judge in allowing the indictment for murder to go to the jury after he had submitted only the charge of involuntary manslaughter to it. We have carefully considered the record in this case and the question posed was not raised during the trial of the case. The rule is well established that if asserted errors are not presented to the lower court, the question cannot be raised for the first time on appeal. State v. Alexander, 230 S. C. 195, 95 S. E. (2d) 160; State v. Bolin, 230 S. C. 204, 95 S. E. (2d) 163, and State v. McCrary, 242 S. C. 506, 131 S. E. (2d) 687.

The appellant next contends that under the case of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. (2d) 694, that the State failed to accord adequate procedural safeguards to secure his privilege against self incrimination. Specifically, he charges that the trial judge was in error in permitting an investigating officer, a witness for the State, to testify as to statements alledgedly made to the officer by him, asserting that such statements were involuntarily made and in violation of the Miranda rule. Upon this basis, the appellant maintains that his statements should have been excluded from the evidence. In the Miranda case it was held that when an individual is taken into custody and before he is questioned or interrogated procedural safeguards must be employed to protect the privilege against self incrimination. The court said:

"* * * He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him

throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

The State, through an investigating officer, attempted to prove a statement made to him by the appellant and counsel for the appellant then made objection thereto. The trial judge then excused the jury and heard testimony from the investigating officer as to the voluntariness of the statement made by the appellant. This officer testified that he gave the appellant the Miranda warnings and in his opinion the appellant understood such warnings and waived his right to remain silent or the privilege of having an attorney present prior to any questioning. Thereafter, this officer took a written statement from the appellant and such was labeled a "voluntary statement". Included in the statement in fine print was an acknowledgment that the Miranda warnings had been given. The appellant testified to the effect that he had not been warned of his constitutional rights nor had he read the written statement before signing it. It thus appears that the testimony of these two witnesses was contradictory, raising an issue of fact as to whether the Miranda warnings were given and the statement thereafter taken was voluntary. The trial judge sustained an objection to the introduction of the written statement because at issue was the question of whether such was voluntary and the printed form of the statement labeled as being voluntary required its exclusion. However, he did hold that any oral statement made by the appellant to

the officer was admissible in evidence. The trial judge heard the confession evidence and resolved the conflicts therein and admitted the oral statement in evidence, such being a determination of the voluntariness thereof. Thereafter, in the presence of the jury, this officer testified that he had advised the appellant of his rights under the Miranda decision, which the appellant apparently understood, and following this he made a voluntary statement. The appellant, before the jury, offered no evidence to the contrary.

The officer testified that the appellant told him that when he was near the corner of Charles and West Bartlette Streets, in the City of Sumter, and had started across the intersection he heard someone call to him and he stopped. He saw Thomas Wright coming in his direction and Wright said "You ain't got nothing", and the appellant didn't know exactly what he meant but he thought he meant money. The appellant also told him at a distance of two to three feet he pulled his 22 caliber pistol from his pocket and as Wright approached the pistol went off, inflicting upon him a fatal injury. He further testified that the appellant told him that he threw the pistol in a field behind a house.

It is our conclusion that the trial judge properly found that there was evidence showing adequate safeguards for the protection of the appellant's constitutional rights and, therefore, correctly admitted the statement made by the appellant.

The trial judge charged the jury that any alleged statement made by the appellant should not be accepted as voluntary unless certain procedural safeguards had been shown by the State before the alleged statement was made. He charged the jury that the State had to show that the

statement was freely and voluntarily made after the defendant was apprised of his constitutional rights as outlined in the Miranda decision.

After the jury had returned a verdict finding the appellant guilty of involuntary manslaughter, a motion was made for judgment *non obstante veredicto*. The basis of the motion was that the testimony did not show beyond a reasonable doubt that the appellant was guilty of involuntary manslaughter. The appellant charges the trial judge with error in refusing such motion.

We have held that where a motion is made for a directed verdict of not guilty, the testimony must be viewed in the light most favorable to the state. The case must be submitted to the jury if there is evidence reasonably tending to prove the defendant's guilt or from which his guilt may be fairly and logically deduced. State v. Rayfield, 232 S. C. 230, 101 S. E. (2d) 505. Viewed in the light most favorable to the State there is evidence that the pistol which killed the deceased was in the hands of the appellant immediately prior to its being discharged and that the pistol was being handled in a negligent or careless manner. The appellant testified that he had not pointed the pistol at the deceased and that the deceased hit the pistol or his hand holding the pistol, resulting in the pistol being fired. There was testimony by witnesses in behalf of the State indicating that the deceased did not strike the appellant's hand or the pistol. The testimony was sufficient to warrant an inference that the death of Thomas Wright was caused by the negligent handling of a loaded pistol within the definition of involuntary manslaughter. State v. Quick, 168 S. C. 76, 167 S. E. 19. There was no error, under the facts here, in submitting the issue of involuntary manslaughter to the jury. The trial judge properly denied

the motion of the appellant for judgment *non obstante veredicto.*

The appellant contended that the death of Thomas Wright was the result of an accident or misadventure. The trial judge fairly and clearly submitted the appellant's contention that the shooting was accidental and that the burden was upon the State to prove beyond a reasonable doubt that the death of the deceased was not due to an accident but was caused and brought about by the negligence or carelessness on the part of the appellant in the handling of a dangerous instrumentality. The appellant alleges error on the part of the trial judge in making this charge. It appears from the record that at the conclusion of the charge the trial judge gave the appellant opportunity, pursuant to Section 10-1210 of the Code, to express any objections to the charge as made. Since the appellant at the time raised no objection to the aforesaid charge as given, such failure constitutes a waiver of any right to challenge the charge as being erroneous. State v. Hyder, 242 S. C. 372, 131 S. E. (2d) 96.

At the conclusion of the charge by the trial judge, the appellant was afforded the opportunity to request additional instructions to the jury. In response thereto, counsel for the appellant stated, "If the jury believed that the boy struck the pistol from his hand and it fired, that would certainly be, what you might say, * * * the man killing himself through inadvertence or mischance." To this statement the trial judge replied, "I took care of that by saying without any fault on the part of the defendant, in my definition of accident or michance." We have reviewed the charge of the trial judge and find that he instructed the jury as follows:

"* * * More practically speaking the defendant says, although there was a discharge of the pistol, it was because of an accident, and the discharge was not through any fault on my part, or any negligence on my part, or any carelessness on my part. * * * "

It is our conclusion that the trial judge committed no error in refusing the appellant's additional request in view of his prior charge on the subject of mischance or accident. We have considered the entire charge as a whole and conclude such charge fully protected the rights of the appellant in respect to his interposed defense.

All of the exceptions of the appellant are overruled and the judgment of the lower court is,

Affirmed.

LEWIS, BUSSEY, BRAILSFORD and LITTLEJOHN, JJ., concur.

The Supreme Court of South Carolina

The State,

Respondent.

v.

Clarence White, Jr.,

Appellant.

Appeal From Sumter County

G. Badger Baker, Judge

Case No. 5856

Opinion No. 18935

ORDER

Appellant has stated, through his attorney, W. L. Clifton, Esquire, his intention to file Petition for Writ of Certiorari in the Supreme Court of the United States for review of our judgment in the above entitled case, which was filed on July 1, 1969. Under the provisions of 28 U. S. C. Sec. 1201 (c), and applicable rules of the United States Supreme Court, the appellant may file petition within nine-

ty (90) days after the final judgment of this Court.

Application is made for stay of remittitur in the case in order to allow appellant sufficient time within which to file his Petition for Writ of Certiorari. Now, therefore,

IT IS ORDERED that for the purpose of granting appellant time within which to file his Petition for Writ of Certiorari, the remittitur in the above entitled matter be and it is hereby stayed to September 29, 1969, which is ninety (90) days from the date on which our opinion herein was filed; and thereafter until the further order of this Court.

S/ J. M. Brailsford,

ASSOCIATE JUSTICE.

Orangeburg, South Carolina

July 10, 1969.

CERTIFIED TRUE COPY

Frances H. Smith,

Clerk, S. C. Supreme Court.